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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 93

ANITA H. COOPER, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 17, 1929

CERTIORARI GRANTED OCTOBER 14, 1929

(34,215)

(34,215)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 906

ANITA H. COOPER, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 20, 1929

[fol. 1]

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 906

ANITA H. COOPER, Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Anita H. Cooper, by her counsel prays that a writ of certiorari issue to the United States Court of Claims directing that court to certify to this court the record in the case of *Anita H. Cooper v. United States of America*, No. H-32 in that court, in order that the judgment of said court rendered on May 6th, 1929, may be reviewed.

Statement of the Case

This suit was to recover income taxes for the year 1921, alleged to have been erroneously and illegally collected and a claim for refund of which had been denied.

The findings of the Court of Claims show that the petitioner, a citizen of the United States and a resident of New York, duly filed her income tax return for the calendar year 1921, and paid the tax shown thereon to be due. In the taxable income reported on the return there was included the sum of $36,670, as a gain derived from the sale on November 7, 1921, of 380 shares of the capital stock of New York County National Bank. These 380 shares of stock were acquired by the petitioner on November 1, 1921, by gift from her husband. At the time the stock was acquired [fol. 2] by the petitioner its fair market value was $210 per share. The petitioner's husband had purchased the stock in 1918 at a cost of $113.50 per share. The stock was sold by the petitioner at a price of $210 a share. In reporting a gain of $36,670 on this transaction, the petitioner followed the provisions of Section 202 (a) (2) of the Revenue Act of

1921, that is to say, the basis used by the petitioner was the cost of the stock to her husband, and the gain reported was the difference between the cost to her husband and the price at which the stock was sold by the petitioner. By reason of the provisions of Section 202 (a) (2), the petitioner was required to pay $8,474.90 more in tax than she would have been required to pay if in computing gain or loss on the said sale she had been permitted to use as a basis the fair market value of the stock at the time it was acquired by her.

The Court of Claims overruled the petitioner's contentions, (1) that the proper basis for determining gain or loss on the foregoing sale was the fair market value of the stock at the time it was acquired by the petitioner, and, (2) that Section 202 (a) (2) of the Revenue Act of 1921 was unconstitutional and void, insofar as it purported to require the petitioner to use as a basis the cost of the stock to her husband. The Court of Claims dismissed the petition, deciding as a conclusion of law that the petitioner was not entitled to recover the tax in issue, and citing as authority for such conclusion this court's decisions in *Taft v. Bowers* and *Greenway v. Bowers,* 49 S. Ct. 199.

[fol. 3] The Statute

Revenue Act of 1921, 42 Stat. 227

"Basis for Determining Gain or Loss

Sec. 202 (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that * * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. * * * In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;"

The Issue

In the case of property acquired by gift and sold prior to the enactment of the Revenue Act of 1921, is the basis for determining gain or loss on such sale the cost of the property to the donor or the fair market value of the property at the time of such acquisition?

Reasons for Granting the Petition

In the view of the petitioner the Court of Claims erred in deciding as a conclusion of law that the petitioner is not entitled to recover and, in effect, holding that the issue here presented is controlled by the decision of this court in the cases of *Taft v. Bowers* and *Greenway v. Bowers,* 48 S. Ct. 199, notwithstanding the transactions here in question were completed prior to the enactment of the Revenue Act of 1921.

In the present case both the gift to the petitioner and the sale by the petitioner took place prior to the enactment of the Revenue Act of 1921. Section 202 (a) (2) must be [fol. 4] given retrospective operation if it is applicable to the gift and sale here in question.

The gifts and the sales considered in *Taft v. Bowers* and *Greenway v. Bowers* all occurred after the passage of the 1921 Act and in those cases the retroactive effect of Section 202) (a) (2) was not passed upon.

This court has held repeatedly that a taxing statute should not be construed to apply to transactions completed when the Act became law, unless that intention be clearly declared; that such a statute should not be given a retrospective operation unless its words make that imperative. *Shwab vs. Doyle,* 258 U. S. 529; *Levy v. Wardell,* 258 U. S. 542.

It cannot be said that the language of the Revenue Act of 1921 requires that Section 202 (a) (2) be applied to a transaction which was completed before the Act became law.

This court has also declared repeatedly that a statute purporting to lay a tax may be so arbitrary and capricious that its enforcement amount to deprivation of property without due process of law within the inhibition of the Fifth Amendment. *Nichols v. Coolidge,* 274 U. S. 531; *Blodgett*

v. Holden, 48 Sup. Crt. Rep. 105; *Untermyer v. Anderson*, 48 Sup. Crt. Rep. 353.

In its opinion in *Taft v. Bowers* this court, referring to the donee of the stock involved in that case, said:

"By requiring the recipient of the entire increase to pay a part into the public treasury, Congress deprived her of no right and subjected her to no hardship. *She accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor. When she sold* the stock she actually got the original sum invested, plus the entire appreciation and out of the latter only was she called on to pay the tax demanded. [fol. 5] The provision of the statute under consideration seems entirely appropriate for enforcing a general scheme of lawful taxation. To accept the view urged in behalf of petitioner undoubtedly would defeat, to some extent, the purpose of Congress to take part of all gain derived from capital investments. To prevent that result and insure enforcement of its proper policy, Congress had power to require that for purposes of taxation the donee should accept the position of the donor in respect of the thing received. *And in so doing, it acted neither unreasonably nor arbitrarily.*" (Italics supplied.)

The petitioner in the present case did not accept the gift with knowledge of the statute, because the statute was not enacted until some three weeks after the gift in question. It cannot be said that she voluntarily assumed the position of her donor.

Congress, in requiring that the donee should accept the position of the donor in respect of the thing received, *must act reasonably and not arbitrarily.*

In *Blodgett v. Holden*, supra, this court, holding that a tax on gifts made prior to the enactment of the 1924 Act was arbitrary and invalid, said:

"It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."

In the instant case the transactions which gave rise to the disputed tax were wholly completed before the statute in question became law. It is submitted that insofar as it purports to require the petitioner in this case to assume the position of her donor, the statute is arbitrary, unreasonable and invalid.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United [fols. 6 & 7] States Court of Claims should be granted.

Wayne Johnson, Counsel for Petitioner, 50 Broadway, New York, N. Y.

[fol. 1] IN COURT OF CLAIMS OF THE UNITED STATES

No. H-32

ANITA H. COOPER

vs.

UNITED STATES OF AMERICA

I. PETITION—Filed Jan. 28, 1927

To the Court of Claims of the United States and to the Honorable the Judges thereof:

The above named claimant, by Johnson & Shores, her attorneys, by this her petition, respectfully shows:

1. The claimant at all times herein mentioned was and is a citizen of the United States and of the State of New York, residing at the Ritz-Carlton Hotel, New York, N. Y.

2. The claimant has a just claim for the refund of $8,474.90 paid by her to the United States of America as income taxes for the calendar year 1921.

3. Pursuant to the requirements of Section 223 and 227 of the Revenue Act of 1921, the claimant, on March 14, 1922, duly filed her income tax return for the calendar year 1921.

[fol. 2] On said return claimant's taxable net income was stated to be $51,561.70 and the total tax due thereon was shown to be $9,618.04.

4. In accordance with the provisions of Section 250 (a) of the Revenue Act of 1921 said total tax of $9,618.04 was paid to the Collector of Internal Revenue for the Second District of New York, in four installments as follows:

$2,404.51 paid on March 14, 1922.
$2,404.51 " " June 14, 1922.
$2,404.51 " " Sept. 15, 1922.
$2,404.51 " " Dec. 15, 1922.

On information and belief, the claimant alleges that the said total tax of $9,618.04, paid to the Collector as aforesaid, was thereafter by the said Collector turned over and deposited into the Treasury of the United States of America as in the course of his official business.

5. In the taxable net income of $51,561.70 reported on the return, as aforesaid, there was included the sum of $36,-670.00 as gain derived by claimant from the sale in 1921 of 380 shares of the capital stock of New York County National Bank, a corporation organized under the laws of the United States, doing business in the State of New York.

6. Said shares of stock were acquired by claimant in 1921 by absolute gift from claimant's husband, Oscar Cooper.

7. At the time said shares of stock were acquired by claimant as aforesaid the fair market value thereof was $210 per share.

[fol. 3] 8. Claimant's husband acquired said shares of stock in 1918 by purchase, paying therefor $113.50 per share.

9. Claimant sold said shares at a price of $210 per share.

10. In determining her taxable net income reported on her return as aforesaid, the claimant computed her gain on the sale of said shares of stock in accordance with the requirements of Section 202 (a) (2), of the Revenue Act of 1921, that is to say, the basis used was the cost of said shares to Oscar Cooper and the gain reported, namely $36,-670.00, was the difference between the cost of said shares to said Oscar Cooper to wit, $113.50 per share, and the price at which said shares were sold by claimant, to wit $210 per share.

11. Claimant contends that the requirements of said Section 202 (a) (2) are unconstitutional and void and that the proper basis for determining the gain derived by claimant from the sale of said shares of stock was the fair market value of said shares at the time same were acquired by her to-wit, $210.00 per share.

12. By reason of the requirements of the said Section 202 (a) (2), the claimant was required to pay $8,474.90 more in tax than she would have been required to pay if the basis for determining gain on said sale was the fair market value of said shares at the time said shares were acquired by claimant.

13. On September 15, 1926, claimant duly filed a claim for refund of said difference in tax to-wit $8,474.90. A true copy of said claim for refund marked Exhibit A is attached hereto and made a part thereof.

[fol. 4] 14. The Commissioner of Internal Revenue wholly rejected said claim for refund on November 30, 1926, and the sum of $8,474.90 is now wrongfully and unlawfully retained and withheld from the claimant without her consent and against her will by the United States of America.

15. No other action than as aforesaid has been had on this claim in Congress, or in any of the Departments. The claimant has at all times borne true allegiance to the Government of the United States. She has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government. She is and always has been the sole and absolute owner of the claim here presented. She has made no transfer or assignment of said claim, nor of any part thereof, nor of any interest therein. She is justly entitled to the amount claimed from the United States of America after allowing all just credits and offsets.

16. Claimant believes the facts as herein stated to be true.

Wherefore the claimant prays for judgment against the United States of America upon the facts and the law for $8,474.90, together with interest thereon from December

15, 1922, and her reasonable costs and disbursements herein.

Wayne Johnson, Johnson & Shores, Attorneys for Claimant. Office & P. O. address: 100 Broadway Borough of Manhattan, City of New York.

[fol. 5] *Duly sworn to by Anita H. Cooper. Jurat omitted in printing.*

[fol. 6] EXHIBIT "A" TO PETITION

Form 843—Jan., 1922

Treasury Department, Internal Revenue Service, Comptroller General U. S., January 18, 1922

(Execute Separate Form for Each Tax Period)

Claim for Abatement of Tax Assessed, Credit Against Outstanding Assessments, X Refund of Taxes Illegally Collected, Refund of Amounts Paid for Stamps Used in Error or Excess

Collector's Notation: District, ——; Account number, ——; Date received, ——. Stamp here: —— ——, Collector of Internal Revenue.

Important.—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to Collector.—Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit: Stamp here: —— —, ——.

STATE OF NEW YORK,
County of New York, ss:

(Name of taxpayer or purchaser of stamps:) Anita H. Cooper.

(Residence—give street and number as well as city or town and State:) Ritz-Carlton Hotel.

(Business address:) New York, N. Y.

This deponent, being sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: ——. Period: From Jan. 1, 1921 to Dec. 31, 1921.

2. (State for or upon what the tax was assessed or the stamps affixed.) Character of assessment or tax—Income Tax.

3. Amount of assessment or stamps purchased $9,618.04

4. Reduction of Tax Liability requested (Income and Profits Tax) 8,474.90

5. Amount to be abated .....

6. Amount to be refunded (or such greater amount as is legally refundable) 8,474.90

7. Dates of payment (see Collector's receipts or indorsements of canceled checks)—Mar.-June-Sept.-Dec., 1922.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed—Second, N. Y.

9. District in which unpaid assessment appears: ——

10. Amount of overpayment claimed as credit $.....

11. Unpaid assessment against which credit is asked; period from —— —, —— to —— —, —— $.....

Deponent verily believes that this application should be allowed for the following reasons:

There was included in the taxable income reported on claimant's return, as taxable profit derived from the sale of 380 shares of stock of New York County National Bank, an amount computed on a basis of $113.50 per share, in accordance with the requirements of Section 202 (a) (2) of the Revenue Act of 1921.

Said shares of stock were donated to claimant during the year 1921 by her husband, Oscar Cooper, and said basis of $113.50 per share was the same basis as should have been used had the said Oscar Cooper sold said shares.

Claimant protests the constitutionality of said Section 202 (a) (2) of the Revenue Act of 1921 and contends that the proper basis for determining the taxable profit derived by her from the sale of said shares of stock was their fair

market value at the time they were so donated to her, to wit, $210.00 per share.

Accordingly claimant demands the refund of $8,474.90, same being the difference in tax by reason of the computation of profit in accordance with said Section 202 (a) (2) instead of on a basis of fair market value of $210.00 per share.

(Attach additional sheets if necessary.)

(Signed:) Anita H. Cooper, by Oscar Cooper, Atty.

Sworn to and subscribed before me this 28th day of August, 1926. L. I. Hueston, Notary Public, Kings County No. 331. Certificate filed in New York, County No. 78. Kings County Register's No. 799. New York County Register's No. 7130. (Seal.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

[fol. 7] II. General Traverse—Filed March 29, 1927

And now comes the Attorney General, on behalf of the Untied States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

O. K. A. H. McC.

III. History of Proceedings

On January 15, 1929, this case was submitted on merits, on stipulation of parties, without argument, by Messrs. Johnson & Shores, for plaintiff, and by Mr. Leslie A. Smith, for defendant.

On March 11, 1929, the court filed an order dismissing the plaintiff's petition.

On April 17, 1929, the plaintiff filed a motion requesting the court to file findings of fact.

On May 6, 1929, said motion was allowed and special findings of fact and conclusion of law were filed, which are as follows:

[fol. 8] IV. **Special Findings of Fact and Conclusion of Law**—Filed May 6, 1929

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

SPECIAL FINDINGS OF FACT

I

Plaintiff, Anita H. Cooper, is a citizen of the United States and a resident of the city of New York, N. Y., and has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted, or given encouragement to rebellion against the said Government.

II

On March 15, 1922, plaintiff filed her Federal income-tax return for the calendar year 1921, in which her net taxable income was stated to be $51,561.70, and the total tax due thereon was shown to be $9,618.04.

III

Plaintiff paid said tax of $9,618.04 to the collector of internal revenue for the second district of New York in four equal installments of $2,404.51 each on March 15, June 17, September 19, and December 18, 1922, respectively, which sums were thereafter turned over and deposited into the Treasury of the United States.

IV

In the taxable net income of $51,561.70 reported by plaintiff on her return as aforesaid there was included the sum of $36,670.00 as a gain derived by plaintiff from the sale in 1921 of 380 shares of the capital stock of the New York County National Bank, a corporation organized under the

laws of the United States and doing busines in the State of New York.

[fol. 9] V

Said 380 shares of stock were acquired by the plaintiff on November 1, 1921, by absolute gift from her husband, Oscar Cooper. At the time said shares of stock were acquired by plaintiff from her husband, the fair market value was $210 per share. Plaintiff's husband acquired said shares of stock during the year 1918 by purchase at a cost of $113.50 per share. Plaintiff sold said shares of stock on November 7, 1921, at a price of $210 per share.

VI

In determining her taxable net income reported as aforesaid plaintiff computed her gain on the sale of said shares of stock in accordance with the requirements of section 202 (a) (2) of the revenue act of 1921—that is to say, the basis used was the cost of the said shares to her husband, Oscar Cooper, to wit, $43,130, and the gain reported, namely, $36,670, was the difference between the cost of said shares to said Oscar Cooper and the price at which the said shares were sold by plaintiff, to wit, $79,800.

VII

By reason of the requirements of said section 202 (a) (2) of the revenue act of 1921 plaintiff was required to pay $8,474.90 more in tax than she would have been required to pay if in determining the gain on said sale she had been permitted to use as a basis the fair market value of said shares at the time they were acquired by the plaintiff.

VIII

On September 15, 1926, the plaintiff filed a claim for refund of said tax of $8,474.90 with the Commissioner of Internal Revenue. A copy of said claim for refund marked "Exhibit A" is attached to the petition herein and is made a part of this finding by reference. On November 30, 1926, the commissioner rejected said claim for refund in full.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that plaintiff is not entitled to recover, and her petiton is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record in this cause, the amount thereof to be ascertained by the clerk and collected by him.

See cases of Taft and Greenway v. Bowers, Collector, decided by the Supreme Court February 18, 1929.

[fol. 10] JUDGMENT

At a Court of Claims held in the City of Washington on the 6th day of May, A. D. 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and her petition is therefore dismissed.

See cases of Taft and Greenway v. Bowers, Collector, decided by the Supreme Court February 18, 1929.

[fol. 11] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,215. Court of Claims. Term No. 906. Anita H. Cooper, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed May 17th, 1929. File No. 34,215.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1929

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 93

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1929.

ANITA H. COOPER, *Petitioner*

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE PETITIONER.

PRINTED IN THE UNITED STATES BY C. G. BURGOYNE, INC., 110 GREENWICH STREET, NEW YORK

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IN THE

Supreme Court of the United States,

OCTOBER TERM—1929.

No. 93

ANITA H. COOPER, PETITIONER

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE PETITIONER.

Opinion of the Court Below.

There was no written opinion of the Court of Claims. See page 13 of the Record.

Jurisdiction.

The judgment to be reviewed was entered by the Court of Claims on May 6, 1929, (R., 13). A petition for certiorari was filed May 17, 1929, (R., 13). It was granted by this court on October 14, 1929, (50 Sup. Ct. Rep. 16) under Section 3 (b) of the Act of February 13, 1925, (c. 229, 43 Stat. 936, 939).

Statement of the Case.

This suit was to recover income taxes for the year 1921, alleged to have been erroneously and illegally collected and a claim for refund of which had been denied. The findings of the Court of Claims show that the petitioner, a citizen of the United States and a resident of New York, duly filed her income tax return for the calendar year 1921, and paid the tax shown thereon to be due. In the taxable income reported on the return there was included the sum of $36,670, as a gain derived from the sale on November 7, 1921, of 380 shares of the capital stock of New York County National Bank. At the time the stock was acquired by the petitioner its fair market value was $210 per share. The petitioner's husband had purchased the stock in 1918 at a cost of $113.50 per share. These 380 shares of stock were received by the petitioner on November 1, 1921, by gift from her husband. The stock was sold by the petitioner at a price of $210 a share. In reporting a gain of $36,670 on this transaction, the petitioner followed the provisions of Section 202 (a) (2) of the Revenue Act of 1921, that is to say, the basis used by the petitioner was the cost of the stock to her husband, and the gain reported was the difference between the cost to her husband and the price at which the stock was sold by the petitioner. By reason of the provisions of Section 202 (a) (2), the petitioner was required to pay $8,474.90 more in tax than she would have been required to pay if in computing gain or loss on the said sale she had been permitted to use as a basis the fair market value of the stock at the time it was acquired by her.

The Court of Claims overruled the petitioner's contentions, (1) that the proper basis for determining gain or loss on the foregoing sale was the fair market value

of the stock at the time it was acquired by the petitioner, and, (2) that Section 202 (a) (2) of the Revenue Act of 1921 was unconstitutional and void, insofar as it purported to require the petitioner to use as a basis the cost of the stock to her husband. The Court of Claims dismissed the petition, deciding as a conclusion of law that the petitioner was not entitled to recover the tax in issue, and citing as authority for such conclusion this court's decisions in *Taft* v. *Bowers* and *Greenway* v. *Bowers,* 278 U. S. 470 (R., pp. 11-13).

Questions Presented.

1. Does that provision of Section 202 (a) (2) of the Revenue Act of 1921, which requires that in the case of a sale of property acquired by gift after December 31, 1920, the basis for determining gain or loss shall be the same as that which it would have been in the hands of the donor, apply when both the gift and the sale occurred prior to the enactment of that Act?

2. If so applied, is that provision constitutional?

The Statute.

Act of Congress approved November 23, 1921, Chap. 136, 42 Stat. 227, 229, 237—

> "Sec. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—
>
> "(1) * * *
>
> "(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to

determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;"

"Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

"(b) Does not include the following items, which shall be exempt from taxation under this title;

"(1) * * * (2) * * *

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income); * * *"

Specification of Errors.

In the view of the petitioner the Court of Claims erred in deciding as a conclusion of law that the petitioner is not entitled to recover and, in effect, holding that the issue here presented is controlled by the decision of this court in the cases of *Taft* v. *Bowers* and *Greenway* v. *Bowers,* 278 U. S. 470, notwithstanding the transactions here in question were completed prior to the enactment of the Revenue Act of 1921.

Summary of Argument.

The language of the statute does not require that Section 202 (a) (2) be given a retrospective operation and therefore the section should not be construed to apply to transactions fully completed before the statute was enacted. *Shwab* v. *Doyle,* 258 U. S. 529.

If applied to the present case, where both the gift and the sale were fully consummated prior to the enactment of the statute, Section 202 (a) (2) is arbitrary and capricious and is invalid under the due process clause of the Fifth Amendment. *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142; *Levy* v. *Wardell,* 258 U. S. 542.

Argument.

This case differs from *Taft* v. *Bowers* and *Greenway* v. *Bowers,* supra, in that in the present case both the gift to the petitioner and the sale by her of the gift property occurred prior to the enactment of the Revenue Act of 1921, whereas in the *Taft* and *Greenway* cases the gifts and the sales took place after the law was passed. The questions presented here, namely, (1) whether Section

202 (a) 2 applies to a case where both the gift and sale were completed before the enactment of the law, and (2) if so whether the section is constitutional, were neither presented nor passed upon in the *Taft* and *Greenway* cases.

If the Section is to be held applicable to the present case, it must be given retrospective operation and must be held to apply to transactions fully consummated prior to its enactment. This court has repeatedly laid down the rule that a taxing statute should not be construed to apply to transactions completed before the act became law, unless that intention be clearly declared; that such a statute should not be given a retrospective operation unless its words make that imperative. *Shwab* v. *Doyle,* 258 U. S. 529; *Levy* v. *Wardell,* 258 U. S. 542. It cannot be said that the language of the Revenue Act of 1921 requires that Section 202 (a) 2 be applied to transactions which were fully completed before the Act became law. The language contains no declaration of retroactivity "clear, strong and imperative," which is the condition expressed in the decisions of this court. *Shwab* v. *Doyle, supra,* and cases there cited. On principle and on the authority of this court it is submitted that Section 202 (a) (2) should not be construed to apply to the state of facts in this case.

If the language of the Act does require that Section 202 (a) 2 be applied to the present case, where both the gift and the sale were fully consummated prior to the enactment of the statute, it is submitted that the Section is arbitrary and capricious and is invalid under the due process clause of the Fifth Amendment. *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142; *Untermyer* v. *Anderson,* 276 U. S. 440.

The petitioner accepted the gift and sold the stock, which was the subject of the gift, prior to the enactment of the statute and consequently without knowledge of the

law. She sold the stock at a price which was equal to its fair market value at the time of the gift. Conceivably she would not have sold the stock had she known that by so doing she would be taxed for the increase which occurred in the value of the stock prior to the gift.

The petitioner in this case was not forewarned of the tax as were the petitioners in *Taft* v. *Bowers, supra* and *Greenway* v. *Bowers, supra.* She did not accept the gift with knowledge of the statute and as to the property received did not assume the position of her donor voluntarily. That position was forced upon her after she had made the sale and when it was too late for her to avoid the tax. The situation is quite the opposite from that considered in the *Taft* and *Greenway* cases where this court said:

> "By requiring the recipient of the entire increase to pay a part into the public treasury, Congress deprived her of no right and subjected her to no hardship. *She accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor.*" (Italics supplied.)

The situation of the petitioner, the donee, in this case is similar to that of the donor in *Blodgett* v. *Holden, supra,* concerning whom this court said:

> "It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."

The petitioner here without forewarning of such consequence sold the stock and now is required to pay a tax on an amount which at the time received was not taxable in her hands.

The practical effect of such a tax is to reduce the value of the gift by the amount of the tax. In the case of a taxpayer subject to the highest tax rates such a tax would reduce the value of the gift by 73%. The normal tax for 1921 was 8% and the highest surtax rate was 65% (Secs. 210 and 211). In a case where the gift property cost the donor $50 and was worth $500 at the time of the gift and was sold by the donee for $500, the taxable profit to the donee under Section 202 (a) (2) would be $450 and if the donee was subject to the highest rates the tax would amount to $328.50 and the value of the gift would thus be reduced from $500 to $171.50. It is submitted that such a tax retroactively applied is arbitrary, capricious, amounts to confiscation and therefore is invalid. *Nichols* v. *Coolidge, supra.*

Until November 23, 1921, when the Income Tax Act of 1921 became law, it was the uniform rule of the Treasury Department, in determining gain upon the sale of gift property, to use as the basis *the fair market value of the property at the time of the gift.* While this rule was in force and before there was any statutory provision on the subject, the petitioner accepted the gift and sold the property for a price equal to its value at the time of the gift. She then had the official assurance of the taxing authorities that there was no tax payable by her on account of the gift. Some time later, Section 202 (a) (2) was enacted and for the first time she was then advised that by reason of the sale she incurred a tax of $8,474.90. It is too late for her to recall the sale and save the tax. If she had known of the tax she might not have changed the form of the gift property from bank stock to cash. She might have elected to hold the stock for investment, collect her dividends and wait until tax rates were reduced. But she was given no election and her situation has been changed permanently and materially to her damage by a retroactive statute. The harshness

of this result suffices to brand the statute as arbitrary, capricious and invalid in its purported application to the present case.

Since *Taft* v. *Bowers, supra* and *Greenway* v. *Bowers, supra* there can be no question but that Congress has the power to require the donee to assume the position of the donor *with respect to gifts and sales made after the enactment of the challenged statute.* In such cases the donee accepts the gift and makes the sale with knowledge of the statute and can elect to incur the tax or avoid the tax at will. But such is not this case for here all the acts which incurred the tax were fully consummated and beyond recall when the statute was enacted. Congress for the first time legislated in the 1921 Act that donees, disposing of their gifts, derive income measured by the excess of the amount received over the value in the hands of the donor when acquired, and thereby made such excess taxable income. In its practical effect this section, newly enacted, made the sale the act which incurred the tax and if retroactively applied would be as unreasonable and as confiscatory as the estate tax and the gift tax, which this court has said may not be measured by lawful transactions fully consummated and beyond recall at the time of enactment of the tax law. In its practical application to the present case the statute is arbitrary, capricious and invalid. "Taxes are very real things and statutes imposing them are estimated by practical results." *Nichols* v. *Coolidge, supra.*

The statement of this court in *Levy* v. *Wardell, supra,* may well be repeated with reference to this tax:

> "The act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation of the constitution of the United States in that it would take the property of the plaintiffs without due process of law in violation of the Fifth Amendment * * * ."

Conclusion.

In conclusion and on the authority of the past decisions of this court on the subject of retroactive taxation, it is submitted (1) that Section 202 (a) (2) of the Revenue Act of 1921 does not apply to the instant case because the gift and the sale both were completed when the statute was enacted and the wording of the statute does not require that it be given retrospective operation; and (2) that when applied to the instant case the Section is arbitrary, capricious and invalid under the due process clause of the Fifth Amendment because the transactions which gave rise to the tax were fully consummated before the law was passed.

Respectfully,

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Attorney for Petitioner,
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New York, N. Y.

November, 1929.

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No. 93

In the Supreme Court of the United States

OCTOBER TERM, 1929

ANITA H. COOPER, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION OF THE COURT BELOW

There was no written opinion by the Court of Claims. See page 13 of the Record.

JURISDICTION

The judgment of the Court of Claims was entered May 6, 1929. (R. 13.)

Petition for writ of certiorari was filed May 17, 1929. (R. 13.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925 (c. 229, 43 Stat. 936, 939).

STATEMENT

Petitioner seeks to recover $8,474.90 income taxes for the calendar year 1921, which she claims

were illegally assessed and collected from her under the following circumstances:

On November 1, 1921, the petitioner received as an absolute gift from Oscar Cooper, her husband, 380 shares of the capital stock of the New York County National Bank, which he had bought in 1918 for $113.50 a share, but which had a fair market value of $210 a share at the time petitioner received them. (Findings V, R. 12.)

On November 7, 1921, six days after these 380 shares were given to her, petitioner sold them for $210 a share, an increase of $36,670 over what they had cost her husband. (Findings V and VI, R. 12.)

On November 23, 1921, the Revenue Act of 1921 was enacted. (C. 136, 42 Stat. 227.) The applicable provisions of that Act are hereinafter set out under the caption "The Statute."

In her income-tax return for the calendar year 1921 (filed March 15, 1922), petitioner included in her taxable income the sum of $36,670 above mentioned, as required by Section 202 (a) (2) of the Revenue Act of 1921. By reason thereof she was required to pay $8,474.90 more in taxes than she would otherwise have been required to pay. (Findings VII, R. 12.)

QUESTIONS PRESENTED

1. Does the provision of the Revenue Act of 1921, that in the case of the sale of property acquired by gift after December 31, 1920, the basis for determining gain or loss shall be the same as that which it

would have in the hands of the donor, apply when the gift and the sale occurred prior to the enactment of that Act?

2. If so applied, is the provision constitutional?

THE STATUTE

Section 202 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 229), which is a part of the Income Tax title of that act, provides, in part, as follows:

> SEC. 202 (a). That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—
>
> * * * * *
>
> (2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. * * * In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition.

Section 200 (1) of the Income Tax title provides that the first taxable year, to be called the taxable year 1921, shall be the calendar year 1921 or any fiscal year ending during the calendar year 1921. (42 Stat. 227, 228.)

Section 263 of the Income Tax title provides "That this title shall take effect as of January 1, 1921." (42 Stat. 271.)

Section 1400 (a) repeals the Income Tax title of the preceding Revenue Act as of January 1, 1921. (42 Stat. 320.)

ARGUMENT

There is no doubt of the power of Congress to tax as income to the donee the difference between the price paid by the donor and the price received by the donee, upon the sale of property acquired by gift. *Taft* v. *Bowers,* 278 U. S. 470. That case arose under the same section of the Revenue Act of 1921 (Section 202 (a) (2) as is here involved, and the only difference between it and the instant case is that here both the gift to and the sale by the donee took place before the enactment of the Act.

There seems to be no question as to the intention of Congress. While the Act did not become a law until November 23, 1921, Section 263 provided that "this title shall take effect as of January 1, 1921," and it applied to incomes received during the entire calendar year. By Section 202 (a) (2), the question whether the basis of determining gain or loss from the sale of property acquired by gift was to be "that which it would have in the hands of the donor" or "the fair market price or value of such property at the time of such acquisition," was expressly made to depend on whether the property was so acquired after or before December 31, 1920. We submit that there is no reasonable basis for a

construction of the Act that Congress did not intend the former basis to be applied in the case of property acquired by gift between December 31, 1920, and November 23, 1921, but sold before the latter date, and that such cases as *Shwab* v. *Doyle,* 258 U. S. 529, and *Levy* v. *Wardell,* 258 U. S. 542, cited by petitioner, have no application.

The question of constitutionality is therefore squarely presented.

The power of Congress to enact income-tax laws which are retroactive over limited periods has been so long recognized that it should not now be questioned. Instances of the retroactive imposition of such laws, as well as of other taxing statutes, are reviewed in the dissenting opinion of Mr. Justice Brandeis in *Untermyer* v. *Anderson,* 276 U. S. 440, 447.

Such a statute may not be held unconstitutional merely because it is retroactive, but only in case it is so arbitrary and capricious that its enforcement would lead to confiscation and offend the Fifth Amendment. *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Blodgett* v. *Holden,* 275 U. S. 142, 147, 276 U. S. 594; *Untermyer* v. *Anderson, supra.*

We submit that there is nothing arbitrary or capricious or confiscatory in the retroactivity of the tax required by Section 202 (a) (2). The three cases above cited, which are relied on by petitioner, are plainly distinguishable. The requirement in an estate tax law of the inclusion in the gross estate of a decedent of property transferred by him long

before its passage (*Nichols* v. *Coolidge, supra*), or a retroactive gift tax imposed on the act of making the gift and to be paid by the *donor* (*Blodgett* v. *Holden, supra; Untermyer* v. *Anderson, supra*) are wholly different from the retroactive imposition of an income tax to be paid by the *donee* on gain actually realized through the sale of property, such as is here involved. That gain is income. If the donor had sold the property and realized the income, Congress would have had power to tax him retroactively upon it. Here the donee received the income, and the power of Congress to tax her upon it has been fully upheld. (*Taft* v. *Bowers, supra.*) We do not believe that the fact that the taxable income was received by her before the enactment of the statute requires a different decision.

CONCLUSION

In view of the very recent and comprehensive exposition by this Court in the cases above cited of the principles which in our view support the decision of the court below in the instant case, it is submitted that review of that decision on certiorari is not required.

Respectfully submitted.

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JULY, 1929.

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No. 93

In the Supreme Court of the United States

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ANITA H. COOPER, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

There is no written opinion by the Court of Claims. That court made findings of fact and conclusion of law. (R. 11–13.)

JURISDICTION

The judgment of the Court of Claims was entered on May 6, 1929. (R. 13.) Petition for writ of certiorari was filed May 17, 1929 (R. 13), and allowed October 14, 1929 (R. 15). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Property was given to petitioner and sold by her within the taxable year contemplated by the Revenue Act of 1921, but prior to the date upon which it was enacted. Section 202 (a) (2) of that Act provides that the basis for computing gain upon the sale of property acquired by gift after December 31, 1920, shall be the cost of the property to the donor. Does this section apply to a sale of such property occurring during the taxable year prior to the passage of the Act, and, if so, does it deprive petitioner of property without due process of law?

STATUTE INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 229, 237, 238, 271:

TITLE II.—INCOME TAX

> SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, *acquired after February 28, 1913,* shall be the cost of such property; EXCEPT that—
>
> ~~(1) Inventory property basis last inventory.~~
>
> (2) In the case of such property, *acquired by gift after December 31, 1920,* the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such

facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. *In the case of such property acquired by gift on or before December 31, 1920,* the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;

* * * * *

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, *or sales, or dealings in property, whether real or personal, growing* out of the ownership

or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

* * * * *

SEC. 263. That this title shall take effect as of January 1, 1921.

STATEMENT

The facts found by the Court of Claims are as follows:

The petitioner, Anita H. Cooper, is a citizen of the United States and a resident of the City of New York. (R. 11.)

In 1918 petitioner's husband acquired 380 shares of the stock of the New York County National

Bank at $113.50 per share. On November 1, 1921, petitioner received by absolute gift from her husband this stock, which she sold on November 7, 1921, at a price of $210 per share. The value at the time of the gift was also $210 per share. (R. 12.)

Petitioner reported in her income tax return for the year 1921 as income, under Section 202 (a) (2) of the Revenue Act of 1921, $36,670, the difference between the cost of said shares to her husband and the price received by her. Petitioner was required to pay $8,474.90 more in taxes than she would have been required to pay had she used as the basis for determining gain the fair market value of the shares at the time they were acquired by her. On September 15, 1926 she filed a claim for refund of this amount. On November 30, 1926, the Commissioner of Internal Revenue rejected this claim. (R. 11, 12.)

Suit was thereupon commenced in the Court of Claims for recovery of the amount. (R. 5.) Upon hearing, the petition was dismissed. (R. 13.) Petition for writ of certiorari followed.

SUMMARY OF ARGUMENT

It is settled that upon the sale of property acquired by gift the donee may properly be required to account for all of the profit over the cost to the donor. It is clear from the statute that it was intended to include in the measure of income all gains received in the calendar year during which the sale here involved took place, including any received before its passage.

The only remaining question is whether such limited retroactivity transcends the power of Congress. With respect to income taxes this Court has repeatedly held that the fact that such a statute may have in some respects a retroactive effect does not cause it to be beyond the power of Congress.

The decisions holding that certain statutes imposing excises upon particular transactions were invalid because of their retroactive effect are distinguishable. This tax was not imposed upon the transaction here involved but upon the net income of the entire period, which included the date of this transaction. The profit upon the particular transaction was included in the measure of the tax, and it is settled that things may be included in the measure of a tax which could not be directly taxed.

If the objection to this tax were upheld, it would be difficult to state a reason why Congress would not be also without power retroactively to increase rates and yet this power has been repeatedly exercised and upheld.

ARGUMENT

A TAX ON INCOME DERIVED FROM THE SALE OF A GIFT AND MEASURED BY THE INCREASE IN THE VALUE OF THE GIFT DURING THE SUCCESSIVE OWNERSHIP OF THE DONOR AND THE DONEE IS NOT VOID BECAUSE OF RETROACTIVITY

In *Taft* v. *Bowers,* 278 U. S. 470, this Court held that where property, the subject of a gift, was sold by the donee, all increase in its value occurring during the ownership of both the donor and the donee

was income to the donee, and subject to tax imposed by Section 202 (a) (2) of the Revenue Act of 1921.

The instant case is governed by the same statute which was involved in the *Taft case,* and differs from it only in that petitioner here received the gift and sold it prior to the enactment of the Act, although within the taxable year embraced by the Act.

In *Brushaber* v. *Union Pac. R. R.* 240 U. S. 1, 20, and *Lynch* v. *Hornby,* 247 U. S. 339, income-tax provisions of the Revenue Act of 1913, retroactive to March 1, 1913, were held to be valid. But, further, the application of the Revenue Act of 1913 to a taxpayer who had died between March 1, 1913, and the effective date of the Act has been held valid. *Brady* v. *Anderson,* 240 Fed. 665, certiorari denied, 244 U. S. 654. No subsequent income tax law has been held unconstitutional because of retroactivity. *United States* v. *McHatton,* 266 Fed. 602; *United States* v. *Boss & Peake Automobile Co.,* 285 Fed. 410, affirmed, 290 Fed. 167; *United States* v. *Updike,* 1 F. (2d) 550, affirmed, 8 F. (2d) 913, certiorari denied, 271 U. S. 661.

In the *Brushaber case* this Court held that the contention was foreclosed by the decision in *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331, where the Income Tax Act of June 30, 1864, as amended by the Act of July 14, 1870, c. 255, Section 17, 16 Stat. 256, 261, was held to be valid though retroactive.

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That decision was consistent with the earlier one in *Billings* v. *United States,* 232 U. S. 261, 282, where this Court held an excise tax on the use of a yacht to be valid, though applied retroactively. Thereafter, in *Hecht* v. *Malley,* 265 U. S. 144, 164, the capital-stock tax provisions of the Revenue Act of 1918 imposing a special excise tax with respect to doing business were applied retroactively to validate an earlier unauthorized collection.

The same rule has been generally applied in construing the retroactive effect of State and municipal taxing measures. See *Seattle* v. *Kelleher,* 195 U. S. 351, 359; *Wagner* v. *Baltimore,* 239 U. S. 207, 216.

Under the law as it existed prior to the Revenue Act of 1921, it was possible for the owner of property which had largely increased in value since his acquisition thereof to escape tax on this increase by a transfer *inter vivos* to another. To avoid resulting loss of revenue, Section 202 (a) (2) of the Revenue Act of 1921, *supra,* was adopted. This section did not create a new form of taxation, but merely broadened the scope of the previous Income Tax Acts. See *Taft* v. *Bowers, supra.* It is thus apparent that the tax in the instant case is one applying only to income and is not essentially different from that which this Court in the *Brushaber* and the *Hornby cases* held might validly be laid retroactively. To give effect to petitioner's contention would be to establish a rule that income derived from certain sources might validly be taxed retro-

actively, whereas other income, because derived from a different source, could not be so taxed.

Petitioner attempts to invoke the rule that a taxing statute should not be given a retrospective operation unless its words make that construction imperative (Pet. Br., p. 6), citing *Shwab* v. *Doyle,* 258 U. S. 529, and *Levy* v. *Wardell,* 258 U. S. 542. It is believed that the rule is not pertinent here.

Those cases arose under Section 202 of the Revenue Act of 1916, and raised the question as to the right of the Commissioner to include in the gross estate of a decedent, for estate-tax purposes, the value of property which the decedent had transferred in trust prior to the passage of that Act. In drawing that Act, Congress manifested no intention that it should be construed retroactively. This Court thereupon held that in the absence of such expressed intention the statute was not to be held retroactive.

In the Revenue Act of 1921, Section 263 specifically provides, "That this title shall take effect as of January 1, 1921." Section 202 (a) (2) of this Act is part of Title II, to which Section 263 refers. By Section 202 (a) (2) the question whether the basis of determining gain or loss from the sale of property acquired by gift was to be "that which it would have in the hands of the donor" or "the fair market price or value of such property at the time of such acquisition," was expressly made to depend on whether the property was so acquired after or before December 31, 1920.

We submit that there is no reasonable basis for a construction of the Act that Congress did not intend the basis of the cost to the doner to be applied in the case of property acquired by gift between December 31, 1920, and November 23, 1921, and sold before the latter date, and that such cases as *Shwab* v. *Doyle* and *Levy* v. *Wardell, supra,* have no application.

Petitioner then contends that if the language of the Act does require that Section 202 (a) (2) be applied, the section imposes an arbitrary and capricious exaction and is invalid under the due process clause of the Fifth Amendment. Petitioner relies upon *Nichols* v. *Coolidge,* 274 U. S. 531, *Blodgett* v. *Holden,* 275 U. S. 142, and *Untermyer* v. *Anderson,* 276 U. S. 440, to sustain this contention. The *Nichols case* arose under Section 402 (c) of the Revenue Act of 1918. Attempt was there made to include in a decedent's estate for estate tax purposes the value of property as to which decedent had made a transfer in trust prior to the enactment of the Act. This Court, in considering the effect of Section 402 (c), as applied retrospectively, said (p. 542):

> An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution.

From this it was concluded (pp. 542–543)—

> that Section 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of the property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious, and amounts to confiscation.

It is believed that the above statement of this Court illustrates the distinction between the effect of the tax in that and the instant case. There the tax was an excise laid upon the doing of an act which had not been taxable when done. Here the tax is laid on income, which by the precise terms of the Sixteenth Amendment is subject to tax. There the tax was measured by the value of the estate which included the value of property previously transferred, but the tax was paid out of the estate remaining at death. Here the tax is measured by income actually received within the taxable year, and the payment is made by the recipient of that income.

In the *Blodgett case, supra,* the Circuit Court of Appeals for the Sixth Circuit certified to this Court the question whether Sections 319–324 of the Revenue Act of 1924 were unconstitutional in so far as they taxed transfers by gifts made prior to the date upon which that Act was approved. Those sections taxed the donor on the exercise of his right to make a gift. This Court answered the

question by saying that the Act did not apply to such gifts, four members of the Court being of the opinion that the Act was unconstitutional so far as it attempted to reach back, and four being of the opinion that there was no intention on the part of Congress to have it reach back. (See 276 U. S. 594.) The recent decision in *Bromley* v. *McCaughn* (No. 27, October Term, 1929, decided November 25, 1929) shows that this tax was an excise falling upon a particular transaction.

The *Blodgett case* was followed by *Untermyer* v. *Anderson, supra,* in which the same question was again presented. In the *Untermyer case* the additional question was raised whether the fact that the Act had been approved by both branches of Congress and was in conference at the time the gift was made, affected the case so far as the question of retroactivity was concerned. This Court there held (p. 445):

> that so far as applicable to bona fide gifts not made in anticipation of death and fully consummated prior to June 2, 1924, those provisions are arbitrary and invalid under the due process clause of the Fifth Amendment.

It is thus clear, as in the *Nichols case,* that the tax in the *Blodgett* and the *Untermyer cases* was an excise laid on the doing of an act, at some time in the past, whereas in the instant case the tax is on income received within the taxable year by the person called upon to pay the tax.

The decisions of this Court holding Federal taxing statutes invalid on account of retroactivity have all involved excises upon particular transactions. As this Court has said in *Knowlton* v. *Moore,* 178 U. S. 41, 88:

> Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc.

Unlike those excises, the tax in this case is not imposed upon any particular transaction. The tax is levied on the net income of a period. Not until after the date of the passage of this Act could it be determined whether any taxable net income had been earned. Although a gain might be realized from an individual transaction during the tax year, it could not be accurately said at the time that any taxable income had resulted, since the losses on other transactions might entirely offset the gain on the particular transaction and leave the individual without a net income. In industry it requires weeks and often months after the end of the year to examine an elaborate accounting system and compute what has been the year's income. The Act, therefore, was passed well within the period that taxpayers customarily require for a complete ascertainment of income and dealt with current events. In a similar situation this Court has referred to it as "limited retroactivity." *Brushaber* v. *Union Pac. R. R., supra,* p. 20. And in *Billings* v. *United States, supra,* p. 282, the statute was said to give the tax "in some respects a

retroactive effect." Accordingly, the tax here involved, if retroactive at all, is so classified merely because the measure of the tax includes the transactions of a period, a part of which has already passed. This Court has already said, in a case where the measure of a tax was the income from all sources, that it is no valid objection that this measure includes, in part, property which, as such, could not be directly taxed. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. Applying that doctrine to this case we submit that it is no valid objection to the tax that the measure includes, in part, gain from a transaction upon which a specific tax could not have been imposed retroactively.

It has been recognized that State income tax statutes may properly measure the tax by the income of a prior year. *Drexel & Co.* v. *Commonwealth*, 46 Pa. 31; *Glasgow* v. *Rowse*, 43 Mo. 479; *Income Tax Cases*, 148 Wis. 456, 514.

And it is well settled (*Maxwell* v. *Dow*, 176 U. S. 581, 602) that the language of a constitutional amendment should be read—

> in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted.

Since it appears that at the time of the adoption of the Sixteenth Amendment it was recognized that

income taxes could properly be measured by the income of a period a part of which had already passed, we submit that the Amendment authorizes income tax legislation of that kind.

All of the Federal Income Tax Acts have been retroactive in the sense that they applied to income for a period which began prior to the passage of the several Acts. We submit that in so far as income taxes are concerned, the practice in the past forecloses the contention that retroactivity brings an Act of Congress within the due-process clause of the Fifth Amendment.

If the objection made here to the measure of the tax is valid, it is difficult to frame a reason why it would not also apply to a retroactive increase in the rate of taxation. The power to increase rates retroactively has been recognized and in time of war Congress has repeatedly found it necessary.

As the Civil War progressed it was found necessary to levy (Resolution July 4, 1864) a special income tax for the whole year of 1863 (13 Stat. 417). This tax was imposed on incomes which had already been taxed at the rates established by a prior Act. In *Stockdale* v. *Insurance Companies, supra,* this Court said (p. 331): "No one doubted the validity of the tax or attempted to resist it."

The Act of June 30, 1864, c. 173, 13 Stat. 223, 281, applied to incomes for the calendar year 1864. The Act of March 3, 1865, c. 78, 13 Stat. 469, 479, ap-

plied to income for the entire year 1865 and raised the rates.

On June 13, 1898, Congress passed an Act to provide ways and means to meet the expenditures of the Spanish-American War (c. 448, 30 Stat. 448). By Section 3 a tax was imposed upon specified articles in addition to the tax already paid. In answer to the contention that the statute was unconstitutional, this Court said (*Patton* v. *Brady,* 184 U. S. 608, 619–620, 623):

> The obligation of the individual to the State is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the government must have in order "to provide for the common defence" and "promote the general welfare." Emergencies may arise; wars may come unexpectedly; large demands upon the public may spring into being with little forewarning; and can it be that having made provision for times of peace and quiet, the government is powerless to make a further call upon its citizens for the contributions necessary for unexpected exigencies?
>
> That which was possible in fact existed. A war had been declared. National expenditures would naturally increase and did increase by reason thereof. Provision by way of loan or taxation for such increased expenditures was necessary. There is in this legislation, if ever such a question could

arise, no matter of color or pretense. There was an existing demand, and to meet that demand this statute was enacted. The question, therefore, is whether Congressional provision must reach through an entire year and at the beginning finally determine the extent of the burden of taxes which can be cast upon the citizen during that year, with the result that if exigencies arise during the year calling for extraordinary and unexpected expenses the burden thereof must be provided for by way of loan, temporary or permanent; or whether there inheres in Congress the power to increase taxation during the year if exigencies demand increased expenditures. On this question we can have no doubt. Taxation may run *pari passu* with expenditure. The constituted authorities may rightfully make one equal the other. The fact that action has been taken with regard to conditions of peace does not prevent subsequent action with reference to unexpected demands of war. Courts may not in this respect revise the action of Congress. That body determines the question of war, and it may therefore rightfully prescribe the means necessary for carrying on that war. Loan or tax is possible. It may adopt either, or divide between the two. If it determines in whole or in part on tax, that means an increase in the existing rate or perhaps in the subjects of taxation, and the judgment of Congress in respect thereto is not subject to judicial challenge.

* * * * *

> Our conclusion, then, is that it is within the power of Congress to increase an excise as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer; that it is no part of the function of a court to inquire into the reasonableness of the excise either as respects the amount, or the property upon which it is imposed.

More recently Section 1 of the Act of October 3, 1917, c. 63, 40 Stat. 300, imposed a tax upon income received in the calendar year 1917 in addition to the normal tax imposed by the Revenue Act of 1916. The Act of February 24, 1919, c. 18, Section 210, 40 Stat. 1057, 1062, provided increased rates beginning with the calendar year 1918 in lieu of the taxes imposed by the Revenue Acts of 1916 and 1917. This Act has been applied without question of its constitutionality. See, for example, *United States* v. *Robbins*, 269 U. S. 315.

Moreover, recent Revenue Acts have contained many provisions extending the basis for determining gross income, or restricting deductions therefrom, which have had the effect of retroactively increasing the burden of the tax. See, for example, War Revenue Act of 1917, c. 63, Secs. 3, 201, 40 Stat. 300, 301, 303; Revenue Act of 1918, c. 18, Secs. 240 (a), 326 (a) (4) and (5), 40 Stat. 1057, 1081, 1092; Revenue Act of 1921, c. 136, Secs. 201 (b), 245 (a) (5), 42 Stat. 227, 228, 262; Act of March

4, 1923, c. 294, 42 Stat. 1560; Revenue Act of 1926, c. 27, Sec. 231 (12), 44 Stat. 9, 40 (U. S. C. App. Title 26, Sec. 982); Revenue Act of 1928, c. 852, Sec. 23 (c), 45 Stat. 791, 799 (U. S. C. Sup. III, Title 26, Sec. 2023).

We submit that the decisions of this Court with respect to certain excises upon particular transactions have not so changed the situation that Congress is impotent in time of national need to meet exigencies by legislation retroactively increasing the rate of income tax or changing the basis of determining gain. As shown above, the statute in the instant case had a special justification in the necessity for preventing further tax avoidance.

It is an established proposition that Congress may retroactively ratify and legalize the collection of taxes which were unauthorized when collected. *United States* v. *Heinszen & Co.,* 206 U. S. 370. In *Charlotte Harbor Ry.* v. *Welles,* 260 U. S. 8, 11, it was said:

> And the power is necessary, that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration.

It is not necessary to go so far to sustain the legislation involved in the case at bar. There is here involved only the power of Congress to impose upon income taxes which are retroactive over a limited period, and that power has been repeatedly upheld by this Court.

CONCLUSION

It is therefore submitted that the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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JANUARY, 1930.

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SUPREME COURT OF THE UNITED STATES.

No. 93.—October Term, 1929.

Anita H. Cooper, Petitioner,
vs.
The United States.
} On Writ of Certiorari to the Court of Claims.

[February 24, 1930.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner paid income taxes assessed according to her return for the calendar year 1921; thereafter, by suit in the Court of Claims she sought to recover a portion of the same ($8,474.90) with interest, which she alleged had been improperly exacted.

Her return showed $36,670.00 as gain derived from the sale of 380 shares of bank stock sold November 7, 1921, at $210.00 per share. She acquired this stock November 1, 1921, by gift from her husband. On that day its fair market value was $210.00 per share; in 1918 it cost her husband $113.50 per share.

The challenged assessment was made under Section 202 (a) (2), Revenue Act, November 23, 1921, effective (Sec. 263) January 1, 1921. Chap. 136, 42 Stat. 227, 229.

> "Sec. 202 (a). That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that— . . .
>
> "(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. . . . In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition. . . ."

The Court of Claims decided against the petitioner; and the cause is here upon certiorari. She maintains—

First, that Sec. 202 (a) (2) should not be construed as applicable to transactions fully completed before enactment of the

statute. Second, that if construed to apply where both gift and sale were consummated before such enactment the section is arbitrary and capricious and, therefore, invalid under the due process clause of the Fifth Amendment.

To support the first point *Shwab* v. *Doyle,* 258 U. S. 529, is cited; for the second *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142; *Untermyer* v. *Anderson,* 276 U. S. 440, are relied upon.

We think the purpose of Congress to apply the provisions of Sec. 202 (a) (2) to the transaction here involved is clear. *Shwab* v. *Doyle* grew out of the Revenue Act of Sept. 8, 1916. There, after considering the relevant circumstances, we declared there was no intention to give retroactive effect to the enactment. Here, the contrary design is not doubtful.

The power of Congress to tax as part of a donee's income the difference between what the gift cost the donor and the price received therefor when sold by the donee was affirmed in *Taft* v. *Bowers,* 278 U. S. 470, and is not now denied.

That the questioned provision cannot be declared in conflict with the Federal Constitution merely because it requires gains from prior but recent transactions to be treated as part of the taxpayer's gross income has not been open to serious doubt since *Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1 and *Lynch* v. *Hornby,* 247 U. S. 339.

Nichols v. *Coolidge,* 274 U. S. 531, held arbitrary and capricious a statute which required executors to pay an excise ostensibly laid upon the transfer of property by death, but reckoned upon its value plus the value of other property conveyed by the decedent before the enactment in entire good faith and without contemplation of death, and said that to enforce it would amount to confiscation. *Blodgett* v. *Holden,* 275 U. S. 142 and *Untermyer* v. *Anderson,* 276 U. S. 440, considered the validity of an enactment which laid a tax upon donors because of gifts fully consummated prior to its passage. We held this was beyond the power of Congress. None of these cases is in point; they gave no consideration to the power of Congress to require that taxable income should include profits from transactions consummated within the year.

We can find nothing unusual, arbitrary or capricious in the provision of the taxing Act here involved, and the judgment of the court below must be affirmed.